No. 87-1183

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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CELOTEX CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; OWENS-CORNING FIBERGLAS CORPORATION; KEENE CORPORATION; H.K. PORTER COMPANY, INC.; FIBREBOARD CORPORATION,

*Petitioners,*

v.

WILEY GOAD,

*Respondent.*

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## REPLY MEMORANDUM

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## REPLY MEMORANDUM

Respondent contends, Br. in Opp., at 2, that the Court could sustain the Sun Oil Company's constitutional challenge to Kansas's application of its statute of limitations at issue in *Sun Oil Company* v. *Wortman*, No. 87-352 (argued Mar. 22, 1988), without necessarily reversing the decision below in this case. Respondent's contention is supported only by a cross-reference to, and incorporation of, his *amicus curiae* brief filed in *Sun Oil*. That brief, however, and the briefs filed by the parties in *Sun Oil*, by and large ignore what petitioners submit is the central question presented by both cases: under what circumstances, if any, may a "forum" state—consistently with the Constitution—apply its statute of limitations to litigation with which its contact consists solely of the defendant's amenability to service of process in that state. As the analysis below demonstrates, Texas has no power to apply its statute of limitations in this case. Furthermore, this analysis produces a bright-line rule which bears no exception such as that suggested by respondent.

### I

### THE NATURE OF THE RESPECTIVE RIGHTS OF PETITIONERS AND RESPONDENT

The fundamental issue in the case at bar involves the *power* of the Texas legislature to prescribe a statute of limitations for this diversity action, which was brought by respondent in a federal district court in Texas for the sole purpose of enabling respondent "to gain application of the Texas statute of limitations."[1]

[1] *See* Brief *Amicus Curiae* of Wiley Goad in Support of Respondents in *Sun Oil Company* v. *Wortman*, No. 87-352, at 27 ("Amicus Brief").

Petitioners do not challenge the power of Texas to determine, in its discretion, the *maximum* time period during which litigants may bring civil actions in its courts. Nor do petitioners challenge the power of Texas to make its courts generally available to nonresident litigants, such as respondent, whose claims have no connection with Texas other than the fact that the defendants, as here, are constitutionally amenable to service of process in Texas. If, however, Texas determines to foster such unconnected litigation in its courts, Texas must do so subject to federal constitutional restraints.

Whether Texas may constitutionally exercise this general power in this case does not turn, as respondent argued to the court below and as that court saw it, on the characterization of the pertinent Texas (or Virginia) statute of limitations as "procedural" or "substantive." Rather, the resolution of petitioners' constitutional claim turns on whether there is any principled constitutional distinction between the "right" Texas has attempted to confer on respondent and the right which this Court held could not be extended to nonresident plaintiffs by Kansas in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985).

**A. *Shutts* from the Perspectives of the Litigants and the State**

In *Shutts*, the Court held that the absence of any constitutional interest of Kansas in claims of nonresidents unrelated to Kansas except for the legal presence of the defendant in Kansas rendered Kansas's attempt to confer legal rights on those nonresidents "sufficiently arbitrary and unfair as to exceed con-

stitutional limits." *Id.*, at 822 (footnote omitted). The holding of *Shutts* can best be explained and applied to the case at bar by viewing it from the separate perspectives of the litigants and the state itself.

Viewed from the standpoint of the nonresident plaintiffs, *Shutts* held that those plaintiffs could not invoke Kansas law to gain an advantage over the defendant because neither those plaintiffs nor their claims had sufficient constitutional contact with Kansas. In other words, those nonresident plaintiffs had no contact with Kansas sufficient to permit them to invoke the apparent benefit of its law even if Kansas desired to extend that benefit to them.

Viewed from the standpoint of the resident defendant, *Shutts* held that the otherwise substantial presence of the defendant in Kansas for the purpose of conducting its business was an insufficient basis upon which to impose on the defendant legal burdens created by Kansas law and projected beyond Kansas's borders to govern disputes between defendant and nonresident plaintiffs. In other words, it was constitutionally unfair for the defendant to have imposed upon it legal obligations respecting transactions with nonresidents which otherwise had no direct connection to Kansas.

Viewed from the standpoint of Kansas, *Shutts* held that a state's generalized interest in regulating the conduct of persons resident or doing business within its borders is an insufficient basis upon which to project the state's powers beyond its borders to transactions otherwise having no connection to that state. In other words, Kansas's regulatory authority stopped at its borders in the absence of any significant state

interest in what, analytically, constituted extraterritorial application of that authority.

Regardless of what the Kansas legislature or its courts might think about the wisdom of the laws of the other jurisdictions with which the nonresident plaintiffs and their claims did have some constitutionally significant contact, Kansas's options under *Shutts* were limited: apply the law of the other jurisdictions no matter how incongruous, or refuse to entertain the claims of the nonresident plaintiffs. *See* note 4, *infra.*

**B. *Shutts* Applied to the Case at Bar**

Petitioners submit that the legal right, burden and power involved in this case are, for constitutional purposes, indistinguishable from the right, burden and power involved in *Shutts*. This point is, perhaps unwittingly, illustrated by respondent himself. Respondent contends that there is a "considerable difference" between the situation in *Sun Oil* and the situation in this case because application of Virginia's statute of limitations may well bar his claim. Br. in Opp., at 2. By this assertion, respondent makes quite clear that he has a quarrel with a policy of Virginia which he finds uncongenial as applied to his particular circumstances. Respondent therefore asserts a "right" to have his claim adjudicated under Texas law, a "right" which is totally independent of Texas's interest in the orderlyadministration of its court system.[2] The question is whether respondent can show

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[2] That this "right" is personal to respondent and has nothing to do with the administration by Texas of its court system is also illustrated by the fact that in Texas, as is true elsewhere, litigants may waive statutes of limitations. *See, e.g., Franco* v.

that Virginia's policy is constitutionally distinguishable from the policies of Oklahoma, Texas and Louisiana which were elevated over the policy of Kansas in *Shutts*.

Although respondent successfully relied on manipulation of the labels "substantive" and "procedural" in the court below, no label-based approach serves to distinguish respondent's situation from the situations of the nonresident plaintiffs before the Court in *Shutts*: those plaintiffs, as respondent here, purely and simply wanted the law of a state with which they and their claims had no discernible contact to be applied because the law of that essentially foreign state would presumably yield a more favorable result.

The "right" respondent claims has nothing to do with the power of Texas to control the administration of litigation in its court system; it does have to do with the power of Texas to confer legal rights and impose legal obligations beyond its borders. Respondent claims the right to have applied to him the "fair" rule prescribed by Texas rather than the assertedly "unfair" rule fashioned by Virginia. Whatever the constitutional content of the word "procedure" might be, its content is not so elastic as to encompass the personal "right" which respondent would have this Court recognize in him and all similarly situated plaintiffs—a right to scour the Nation in search of a jurisdiction whose statute of limitations breathes new life into a claim that has expired as a matter of the policy of the jurisdiction in which it otherwise could have been maintained. This Court held

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*Allstate Insurance Co.*, 505 S.W.2d 789, 793 (Tex. 1974)); *Allen* v. *Smith*, 129 U.S. 465, 470 (1889).

in *Shutts* that, under similar circumstances, the forum state could not extend the benefits of its laws to nonresidents; this case is no different.

Conversely, petitioners submit that there is no principled basis upon which to distinguish, constitutionally, their plight from that of the defendant in *Shutts*. In *Shutts*, the defendant, a Delaware corporation, was sued in Kansas, where it owned property and conducted substantial business. On that basis, as well as other bases not even arguably present in the case at bar, the Supreme Court of Kansas concluded that Kansas had a constitutionally sufficient interest justifying application of its laws to the defendant. This Court, analyzing those interests, disagreed and reversed. 472 U.S., at 819. The constitutional unfairness of Kansas's assertion of power in *Shutts* was manifest, and that same unfairness is equally obvious in the case at bar.

Finally, the interest of Kansas in regulating the conduct of a person resident in Kansas is surely at least as substantial as any interest Texas may have in imposing on petitioners its statute of limitations. No discernible interest Texas has in the administration of its own court system would be affected by a constitutional barrier to its applying its statute of limitations to this case.

If it was, as the Court held in *Shutts*, "unfair and arbitrary" for Kansas to apply its law to the conduct of a person resident and doing business in Kansas, it is difficult to comprehend how petitioners could not have a justifiable, constitutionally based expectation that they may not be subjected to the vagaries of innumerable statutes of limitations in cases brought in jurisdictions having no connection whatsoever to

them or the litigation other than the presence of petitioners in those jurisdictions. The irreducible teaching of *Shutts* is that a forum state has no power to confer legal rights on nonresident litigants or impose legal burdens on resident defendants absent some substantial state interest in doing so. Where, as here, no state interest in the administration of its court system is present, the statute of limitations established by the state which does have substantial contacts with the parties and the subject matter of the litigation—Virginia—must be applied.

## II

## THE RELEVANCE OF THIS COURT'S DISPOSITION OF *SUN OIL*

In view of the respective "rights" of petitioners and respondent and the power of Texas to control its court system as discussed above, respondent's assertion that his position could survive a decision of this Court in *Sun Oil* requiring the application of statutes of limitations other than that of Kansas to the claims of nonresidents is without merit. Respondent purports to support this position by asserting that the claims of the plaintiffs in *Sun Oil* "could have been brought at any time," whereas his own claim was probably barred under the law of Virginia. Br. in Opp., at 2.

Respondent's assertion is nothing more than a cryptic rendition of the argument he makes to this Court as *amicus curiae* in *Sun Oil* that the Court should constitutionalize discovery rules in the "latent injury context" even if the Court were to sustain the position of the Sun Oil Company in *Sun Oil*.[3]

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[3] Amicus Brief, at 27-28.

Respondent's argument to the Court in *Sun Oil* proposes the recognition of a constitutional distinction between plaintiffs possessing contract (and presumably all other) claims and plaintiffs possessing "personal injury" claims, with the former being constitutionally chargeable to discover their claims while the latter should not be. Although the legislatures of the several States are constitutionally free to recognize such a distinction and apply it to litigants and cases with which they have a substantial connection, there is nothing in the nature of those rights of action which supports the constitutional distinction respondent implicitly urges in his Opposition and argues more fully in *Sun Oil*.

Indeed, respondent's argument on this point merely illustrates that the case at bar has *nothing* to do with the manner in which Texas administers its court system and has *everything* to do with the respective powers of Virginia and Texas to establish the legal rights and burdens to be enjoyed and borne by the parties to this case.[4] If Sun Oil's challenge to the application

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[4] Under petitioners' submission, and contrary to respondent's argument, Amicus Brief, at 10-11, whether the state having substantial contacts with the litigation would, as a matter of policy, choose to have its pertinent statute of limitations applied by a "forum" state such as Texas is irrelevant, as is the related, somewhat more abstract question whether that "non-forum" state would regard its statute of limitations as "substantive" or "procedural." Texas's charactaization of its statute of limitations is also irrelevant, because Texas may constitutionally apply its statute of limitations to this case solely in furtherance of a concrete interest in the administration of its court system. In short, Virginia's statute of limitations must be applied to this case because the Texas courts would be without power to apply the Texas statute. Here, as in *Shutts*, the Constitution limits

of Kansas's statute of limitations is sustained by the Court, the petition in this case should be granted, the decision below vacated, and the case remanded for further proceedings to determine whether respondent's claims are barred by Virginia's statute of limitations.

April 15, 1988 Respectfully submitted,

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the forum state's options: the Texas courts may refuse to entertain this and similar cases altogether, but they must apply Virginia's statute of limitations as if the case were being litigated in Virginia's courts.